IN THE

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1977

NO. 77-620

JOHN GUYTON
Petitioner

VS.

STATE OF OHIO
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR SUMMIT COUNTY, OHIO

RALPH B. MAHER
Attorney for Petitioner
630 Centran Building
Akron, Ohio 44308
(216) 762-8691

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I N D E X

TABLE OF CASES

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Petitioner, by and though his attorney, Ralph B. Maher, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the Court of Appeals for Summit County, Ohio.

OPINIONS BELOW

The Supreme Court of Ohio rendered no opinion. The unreported opinion of the Court of Appeals for Summit County, Ohio is printed as Appendix A.

JURISDICTION

The Supreme Court of Ohio dismissed Petitioner's appeal and overruled Petitioner's motion for leave to appeal on June 30, 1977. Said orders are set forth at Appendix B and C respectively. On September 22, 1977, Mr. Justice Stewart extended the time for filing a petition for writ of certiorari to October 28, 1977. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28--United States Code--§1257(3).

QUESTIONS PRESENTED

1. Whether a motion to suppress evidence should have been overruled where said evidence was obtained as a result of a warrantless unreasonable search of the sleeping occupant of a parked car in light of the fact that the searching police officers testified they did not believe the occupant had committed, was committing or was about to commit a crime

2. Whether the Court of Appeals for Summit County, Ohio, erred in upholding the above mentioned search by expanding the narrow emergency exception to the Warrant Clause to include a situation where police officers were merely responding to a call "4" which symbol stands for "possible intoxicant," and where said officers had no probable cause to search.

3. Whether the subsequent full body search of the person by the two police officers outside the vehicle and the resultant seizure of a weapon are authorized when said police officers testify that the search and seizure were both made prior to any arrest and upon a person not known to be armed and not believed to be dangerous.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

United States Constitution Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 14, 1975, at about 6:00 P.M., Petitioner left the gasoline service station he owned and operated to make a night bank deposit. He made this trip in his 1966 Thunderbird and brought with him a .38 caliber revolver, which he placed in a belt holster located underneath his jacket. After making the deposit he proceeded to a V.F.W. Club located in his Akron, Ohio, neighborhood, and after sticking the revolver between the console and the seat of the car, he went in and had three or four drinks of liquor. He left the Veterans Club around 8:00 P.M. and started back towards his service station. While enroute along a lightly travelled residential street he realized that he was getting sleepy or feeling some kind of reaction. He therefore pulled over to the opposite side of the street and parked the car facing traffic by placing two of the wheels on the berm and two of the wheels on the street. (Tr. pp. 71, 88).[1] He then turned off his motor, while leaving the headlights on.[2]

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1. Tr. refers to the Reporter's Transcript of the proceedings in the Common Pleas Court of Summit County, Ohio.

2. The Court of Appeals mistakenly stated in its opinion that the engine was left running. (App. A, infra, pp17,19). Of the five witnesses who testified, only Officer Burrell stated that "the engine was running." (Tr. p. 76). Officer Sparks couldn't recall whether the engine was running (Tr. p. 7). Petitioner, witness Paul Brunson and witness Annie McLane, who had observed

(Footnote continued on following page.)

Subsequently Witness Annie McLane, who lived across the street from where Petitioner parked his car, went to the home of Witness Paul Brunson to discuss the matter and then called the Akron Police Department to report that there was an individual parked in front of her home with the headlights burning and his head lying on the steering wheel. Two Akron policemen, Officers Robert Sparks and Michael Burrell, received a signal "4", which roughly translates to "suspected intoxicant," over their radio and arrived at the scene at 8:55 P.M. The Officers testified that there had been no reports of any violence, emergencies, or criminal activity in the neighborhood and that they were not looking for either a 1966 Thunderbird or a person fitting Petitioner's description. At the time of their arrival in the quiet residential neighborhood the only persons on the street were Witness McLane and Witness Brunson and his wife.

The Officers approached the scene by pulling their patrol car behind Petitioner's automobile so that their headlights shined through his rear window. Officer Sparks approached the car from the rear on the driver's side while Officer Burrell approached from

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2. (Footnote two continued from previous page). the automobile for at least a half an hour prior to the arrival of the Officers, and who were at the scene while all relevant events transpired, all stated that the engine was not running. (Tr. pp. 56,71,124). The Trial Court also felt that the evidence indicated that Mr. Guyton would have had to "start his car" to drive away. (Tr. p. 53).

the rear on the passenger's side. They both observed that Petitioner's head was still lying on the wheel. At that time neither Officer had any inkling that Petitioner was armed and both stated that they weren't afraid of him. Both officers testified that when they arrived they didn't know what was wrong with Petitioner although Officer Sparks smelled what he believed to be alcohol. Officer Sparks further testified that to his knowledge Petitioner "had not committed a crime, was not committing a crime and was not about to commit a crime." (Tr. p. 30). Similar testimony was given by Officer Burrell, (Tr. p. 97), who also described the situation as a "rather peaceful scene." (Tr. p. 96).

After surveying the situation, Officer Sparks proceeded to reach inside the automobile and shake Petitioner by the shoulder about four or five times. Prior to Officer Spark's entry into the car the the Trial Court found that Petitioner's slumped position and the 3/4 length winter jacket he was wearing prevented the Officers from observing anything around his person. However, as the shaking progressed, Officer Burrell testified he saw something hanging from Petitioner's side.

After the repeated shaking of Petitioner, he was awakened and told to get out of his car. No resistance was given by the Petitioner, and he was searched while spread-eagled against his car. According to the Officers' testimony the empty holster was located under Petitioner's coat and then the revolver was found in his rear pocket. Officer

Sparks then advised him he was under arrest for carrying a concealed weapon and finally advised him he was being arrested for intoxication.[3]

On March 13, 1976, Petitioner was indicted for carrying a concealed weapon in violation of Section 2923.12, of the Ohio Revised Code, and, secondly for having a weapon while under disability, in violation of Section 2923.13(A) (2), of the Ohio Revised Code. The federal

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3. The Court of Appeals mistakenly stated in its opinion that the holster had been seen by one officer while Petitioner was still in the car and that as soon as he got out of the car he was arrested for intoxication. (App. A. infra pp17 - 19). Both officers testified they did not know Petitioner was wearing a holster while he was in the vehicle. (Tr. pp. 9, 82, 86). The Trial Court confirmed this in his Findings of Fact. (Tr. pp 53, 132). The record is also clear that Petitioner was first searched outside the car and then arrested. In fact this scenario was presented by the State of Ohio in the statement of facts included in its answer brief filed in the Court of Appeals for Summit County. At page three the Prosecuting Attorney stated that when the revolver was found in his rear pocket, "Appellant was subsequently placed under arrest for carrying a concealed weapon and intoxication." Both Officers testified that after the search outside the vehicle the Petitioner was arrested for carrying a concealed weapon and intoxication. (Tr. pp, 20, 23, 102 and Transcript of Preliminary Hearing pp. 5-6.)

questions sought to be reviewed by this Court were raised in the court of first instance on June 3, 1976 when Petitioner filed his motion to suppress evidence, said motion being set out as Appendix D. The motion to suppress was overruled at a hearing in the Common Pleas Court of Summit County, Ohio, held on June 21, 1976, and June 22, 1976. The Petitioner then entered a "no contest" plea to the two counts of the indictment. The journal entry overruling the motion is printed as Appendix E. The Petitioner was sentenced to the Chillicothe Correctional Institute, and said sentence was held in abeyance and his prior bond was continued pending appeal. Subsequent to the decision of the Court of Appeals for Summit County, Ohio and the Supreme Court of Ohio, the same bond was continued to apply during this appeal to the United States Supreme Court.

On July 22, 1976, timely notice of appeal was filed, and on February 2, 1977, the Court of Appeals of Summit County, Ohio, affirmed the judgment. The opinion of the Court is set out as Appendix A. Petitioner's assignments of error to the Court of Appeals which raised the federal question presented in this petition are included in said opinion. On March 4, 1977, timely notice of appeal was filed; and on June 30, 1977, the Supreme Court of Ohio dismissed Petitioner's appeal and overruled Petitoner's motion for leave to appeal, said orders being set forth at Appendix B and C respectively. The propositions of law presented in the Supreme Court of Ohio which raised the federal questions sought to be reviewed in this Court are printed as Appendix F.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW REGARDING THE CONDUCT OF THE RESPONDENT IS CONTRARY TO THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND RELEVANT DECISIONS OF THIS COURT.

The Court of Appeals for Summit County, Ohio, "deemed the situation as it existed at the time the officers responded to the call '4' to be an emergency." (App. A, infra p.20) On the basis of this finding the Court held that the search of Petitioner both inside and outside of his parked automobile was neither improper nor unreasonable. In reaching its decision, the Court made no finding that the police had probable cause to search Petitioner in his parked car at the time Officer Sparks entered the vehicle.

Fifty-two years ago in Carroll v. United States, 267 U.S. 132, 156 (1925) this Court held that in the absence of probable cause to search an automobile, the Fourth Amendment protects the owner from the use of the seized items as evidence against him. Since that time, "in enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, this Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." Chambers v. Maroney, 399 U.S. 42, 51 (1970).

In its most recent decision in this area, this Court stated that there are "significant differences between motor vehicles and other property which permit

warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other context." United States v. Chadwick, 97 S. Ct. 2476, 2484 (1977). Yet, "although the expectation of privacy in an automobile is significantly less than the traditional expectation of privacy assoicated with the home,. . . (citing cases). . .the unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances. South Dakota v. Opperman, 96 S. Ct. 3092, 4000-4001 (1976). (Powell, J. concurring). The search and seizure in this case constitute just such circumstances.

The Court of Appeals upheld the search in this case simply by stating it was pusuant to an emergency. Initially this finding is contrary to the testimony of the searching officers themselves, who testified that a rather peaceful scene existed at the time they surrounded Petitioner's car. Moreover, the sua sponte determination by the Court of Appeals that the emergency search doctrine applied was made without citing any precedent from this Court. In effect the Court ignored the fact that the Carroll doctrine is not applicable unless there is a conjoining of the two elements of probable cause and genuine exigent circumstances. This Court has pointedly stated that "the Carroll doctrine does not declare a field day for the police in searching automobiles. Automobiles or no automobile, there must be a probable cause for the search." Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973).

The Officers' testimony at the suppression hearing demonstrates that none of the specifically established and well-delineated exceptions to the exclusionary rule, including "search incident to arrest,[4]" Preston v. United States, 376 U.S. 364 (1964); "hot pursuit," Warden v. Hayden; 387 U.S. 294 (1967), consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) and the "plain view" doctrine,[5] Coolidge v. New Hampshire, 403 U.S. 443 (1971), are applicable here. In light of this Petitioner can only conjecture that the real reason behind the decision of the Court below is an unwarranted feeling that this Court's recent holding in South Dakota v. Opperman, supra, that probable cause to search is not needed when law enforcement officers pursuant to standard procedure are conducting an inventory of an unoccupied properly impounded vehicle, should be interpreted as a virtual overruling of the prior precedents discussed herein. Initially unlike the search in Opperman, the search in this case was conducted in an occupied vehicle and under circumstances where an investigatory police motive was present. Moreover, at the time of the search, Petitioner was asleep in the privacy of his own parked automobile.

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4. The arrest here did not occur until after Petitioner was searched outside the vehicle.

5. While Petitioner was slumped forward, nobody could observe anything. (Tr. P. 135).

Throughout all court proceedings Petitioner has focused his argument on the fundamental principle pronounced in Katz v. United States, 389 U.S. 347, 351-352 (1967), that "the Fourth Amendment protects people, not places. . .what (a person) seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." This Court recognized the privacy interest the occupant of an automobile possesses in United States v. Ortiz, 422 U.S. 891, 896 (1975):

> "a search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search."

The decision below disregards this interest and thus squarely presents the question of the continued validity of the core of this Court's prior precedent in this area.

Petitioner also contends that the conduct of the Officers in conducting the full body search outside the vehicle was unconstitutional. The search and seizure were conducted prior to the time the Officers testified Petitioner was placed under arrest. Therefore the holding in United States v. Robinson, 414 U.S. 218 (1973), and Gustafson v. Florida, 414 U.S. 260 (1973), that where there has been a lawful custodial arrest incident to a traffic infraction there may be a subsequent full search of the arrestee, is inapplicable. Since the search and seizure in this case were

not made incident to a lawful arrest, the police officers were subject to the limitations placed by Terry v. Ohio, 392 U.S. 1 (1968) on searches based on less than probable cause. The clear holding of Terry v. Ohio , ibid, is that "'when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officers or to others,' he may conduct a limited protective search for concealed weapons." Adams v. Williams, 407 U.S. 143, 146 (1972), citing Terry v. Ohio, supra at 24.

In this case both officers testified that they did not believe Petitioner was dangerous and that they did not fear him. They also did not know he was armed. Thus there is nothing in the record to indicate that even the minimal standards of Terry were met. The police had initially exceeded their authority in searching Petitioner inside the vehicle. They subsequently exceeded their authority in conducting a full body search outside the vehicle when they did not believe he was armed and dangerous. In essence a search and seizure were performed which were within the purview of the Fourth Amendment, see Terry, supra at 16; and which were not within any of its narrowly drawn exceptions.

If the decision of the Court of Appeals is permitted to stand Petitioner's "freedom from unconscionable invasions of privacy, and the freedom from convictions based upon coerced confessions," Mapp v. Ohio, 367 U.S. 643, 657 (1961) would be irreparably damaged. The decision authorizes police conduct that is in no way consonant

with "the purpose of the exclusionary rule which 'is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it.'" Mapp v. Ohio, ibid, at 656, citing Elkins v. United States, 364 U.S. 206, 217 (1960). Consequently, this Court should grant certiorari in order to reassert the fundamental Fourth Amendment rights Petitioner has been denied.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Ralph B. Maher

RALPH B. MAHER
630 Centran Building
Akron, Ohio 44308

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 1977, three copies of this Petition for Writ of Certiorari were mailed to Carl M. Layman III, Assistant Summit County Prosecuting Attorney, 53 East Center Street, Akron, Ohio, 44308. I further certify that all parties required to be served have been served.

Ralph B Maher

RALPH B. MAHER

APPENDIX A

STATE OF OHIO) IN THE COURT OF APPEALS
) NINTH JUDICIAL DISTRICT
SUMMIT COUNTY) (January Term, 1977)

STATE OF OHIO)
Plaintiff-Appellee) C. A. No 8211
)
v.) APPEAL FROM JUDGMENT
) ENTERED IN THE COURT
JOHN GUYTON) OF COMMON PLEAS OF
Defendant-Appellant) SUMMIT COUNTY, OHIO
CASE NO. 76 1 118

DECISION AND JOURNAL ENTRY

Dated : February 2, 1977

This cause was heard December 15, 1976, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

HUNSICKER, J.

On June 23, 1976, the defendant-appellant, John Guyton, entered a plea of no contest to an indictment for "carrying concealed weapon" and "having weapon while under disability." The trial court, after hearing the statements of counsel and based on the facts of the case as found by the court, sentenced Guyton to Chillicothe Correctional Institute. The sentence was ordered held in abeyance pending an appeal.

Prior to the plea of no contest, a motion to suppress evidence was filed. This motion alleged that the search of the Guyton automobile was unlawful, the search of the person of Mr. Guyton was unlawful, the physical evidence including a loaded .38 caliber revolver was obtained as a result of the illegal arrest and all fruits of the search incident to the arrest of Mr. Guyton must be suppressed. The motion to suppress was overruled and the no contest plea followed.

On appeal to this court, the appellant says:

"1. The trial court erred in overruling the Motions to Suppress Evidence seized after a warrantless search which was totally lacking in probable cause which search might even had been made in good faith, but where there were no exigent or emergency circumstances, and when said search was made prior to any arrest.

"2. The trial court, based on the above proposition, erred when he overruled the Motions to Suppress Evidence seized after a routine search of a motorists (sic) person, and a subsequent arrest for two other non-related traffic offenses, including a weapon, unless the Officer or Officers have probable cause for believing he is armed and dangerous.

"3. The trial court, based on the proposition in Assignment of Error No. 1, erred when he overruled the Motions to Suppress Evidence seized from Defendant-appellant and from a given 'area,' to wit: the inside of Defendant-appellant's motor

vehicle, which he seeks to preserve as private, even though said 'area' may be accessible to the public, and thus should be constitutionally protected, inasmuch as the Fourth Amendment protects people, not places.

"4. The trial court, based on the proposition in Assignment of Error No. 1, erred when he overruled the Motions to Suppress Evidence, where the Exclusionary Rule covering evidence obtained by an illegal search and seizure, should have been followed, as there were none of the judicially recognized exceptions to the Rule,***."

The entire basis of the appeal and the assigned claimed errors raised the question of the validity of search and seizure in this case. We shall discuss together the assigned errors.

On December 14, 1975, John Guyton, was found slumped over the steering wheel of his automobile by two Akron Police Officers who came to the location at the request of their dispatch officer. The officers said it was 8:55 P.M.; the Guyton automobile was parked in the opposite direction to traffic on the left side of the street; the lights of the vehicle were lit, and the engine was running. The officers with some effort awakened Guyton. While awakening Guyton, one officer noticed he had a gun holster fastened to his belt. They also noticed Guyton, before alighting from the automobile "was moving his hand around by his right leg, couldn't see nothing in there at that time." The officers said they had their guns drawn at that time as a safety precaution. The officers on

patting Mr. Guyton down found the loaded .38 caliber revolver mentioned above.

The officers said that, as soon as Mr. Guyton got out of the automobile, they arrested him for intoxication. The offense with which he was ultimately charged is "C.C.W," that is carrying a concealed weapon. Counsel for the defense questioned the officers as to the time when the arrest for intoxication took place, before or after the arrest for carrying a concealed weapon. Defense counsel agrees that if the first arrest was for the offense of operating a motor vehicle under the influence of alcohol of which Mr. Guyton was guilty, then search and seizure was lawful. There apparently was no great time period between the first and second arrest, whichever came first. It was all a part of the transaction of investigating a suspicious vehicle parked unlawfully on a public highway with an incapacitated occupant under the steering wheel

Mr. Guyton operated a Sunoco gasoline station. On the night of Sunday, December 14, 1975, he testified that he took the receipts from his business to a bank where he could deposit it. He said he went to the Clark gas station on Copley Road, Akron, Ohio to buy cigarettes, then went to the V.F.W. Club. He did not take the gun he carried to the bank, into the club but hid it in his automobile. He drank a few drinks then drove his automobile "down Copley Road." Mr. Guyton said he is a diabetic and when he felt "strange in the head," he pulled over and stopped. The police came and the events detailed above took place. Mr. Guyton said the revolver was in the automobile between a console of his 1964 Thunderbird

and the seat. Mr. Guyton said it was at this hiding place where the police found the revolver; the police said they took it from his pocket.

Under the facts of this case as found by the trial judge, based on the evidence submitted to him, were the officers justified in taking the action which they did in conducting a "search and seizure" of Mr. Guyton's gun?

We are impressed by the excellent opinion written by Judge Sherer of the Second Appellate District in State v. Call, 8 Ohio App. 2d 277. We see no need to again repeat the exhaustive survey of Federal cases set out in that opinion. In the Call case, the arrest was for a traffic violation and no complications. In the instant case, there was a traffic violation with other features. Did a vehicle parked against oncoming traffic, its lights on, motor running and the driver slumped over the steering wheel, present an emergency situation? We belive it did. The officers did not know if the driver of the vehicle was ill, dead, suffering seizure or from what cause. It could be false action by a dangerous person. The officers had a duty to be careful and use caution to protect Mr. Guyton, a large man physically, and to protect themselves.

When Mr. Guyton was in the vehicle, one officer saw the holster and when Mr. Guyton was patted down, the gun was found in the pocket of the appellant. The situation is neither the Call case nor the case of State v. McCray, 46 Ohio App. 2d 106 (1975).

This court has examined the authorities concerning search and seizure under emergency conditions in State v. Love, Summit #7631 (9th Dist. Ct. App., April 30, 1975). We adopt herein the conclusion of that case on that subject. We deem the situation as it existed at the time the officers responded to the call "4" to be an emergency. The conduct of the officers was neither improper nor unreasonable.

The judgment is affirmed.

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The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Court of Common Pleas to carry this judgment into execution, shall issue out of this court. A certified copy of the journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ William H. Victor
Presiding Judge
- for the Court -

MAHONEY, P. J. AND
HARVEY, J. CONCUR.

(Hunsicker, J., retired Judge of the Ninth District Court of Appeals, and Harvey, J.,

retired Judge of the Court of Common Pleas of Summit County, sitting by assignment under the authority of Article IV, Section 6(C), Constitution).

APPEARANCES:

STEPHAN M. GABALAC, (Frederick L. Zuch, Asst. Prosecutor), City-County Safety Building, 53 E. Center St., Akron, Ohio 44308 for Plaintiff-Appellee.

RALPH B. MAHER, Attorney at Law, 630 Centran Building, Akron, Ohio 44308 for Defendant-Appellant

APPENDIX B

THE SUPREME COURT OF OHIO
1977 TERM

THE STATE OF OHIO)To wit: June 30, 1977
City of Columbus)

State of Ohio Appellee,	)	No. 77-369
vs.	)	APPEAL FROM THE COURT
John Guyton, Appellant.	)	OF APPEALS for Summit County

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this_____day of_____, 1977

_____Clerk

_____Deputy

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

1977 TERM

THE STATE OF OHIO)To wit: June 30, 1977
City of Columbus)

State of Ohio,)
Appellee,) No. 77-369
)MOTION FOR LEAVE TO APPEAL
vs.)
)FROM THE COURT OF APPEALS
John Guyton,)
Appellant.) for Summit County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00 paid by Ralph B. Maher.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of this Court this____day of_____1977

_____Clerk

_____Deputy

APPENDIX D

IN THE COURT OF THE COMMON PLEAS
SUMMIT COUNTY, OHIO

THE STATE OF OHIO) Plaintiff)	CASE NO. 76 1 118
-vs-)	ASSGND. JUDGE: SAM H. BELL
JOHN GUYTON) Defendant)	MOTION TO SUPPRESS EVIDENCE

Now comes the defendant, John Guyton, and respectfully moves the Court to suppress all evidence seized as a result of a search of his person and/or automobile at or near 1110 Juneau Street, Akron, Ohio, on the 14th day of December, 1975.

As grounds for this motion, Defendant states:

1. Any physical evidence, including a weapon, obtained as a result of the search and seizure of his person and automobile was obtained as a result of an illegal search and seizure and, therefore, unlawful.

2. Any physical evidence, including a weapon, obtained as a result of the search and seizure of his person and automobile was obtained as a result of an illegal arrest and, therefore, unlawful.

3. The search of Defendant's person and automobile was illegal and all fruits of the search incident to the arrest must be suppressed.

4. Petitioner-Defendant states that the physical evidence, including any weapon, was seized from him against his will and without search warrant in violation of his rights and in violation of Article 1, Section 14, Constitution of the State of Ohio and the Fourth Amendment and the Fourteenth Amendment to the Constitution of the United States.

5. For such other reasons as may appear upon oral Hearing of this Motion.

Evidentiary Hearing Requested.

Memorandum attached pursuant to Rule 47 of the Ohio Rules of Criminal Procedure.*

Respectfully submitted,

/s/ Ralph B. Maher
RALPH B. MAHER, Attorney
for Defendant, John Guyton
630 Centran Building
Akron, Ohio 44308
Phone: 434-6186/762-8691

PROOF OF SERVICE

The above Motion to Suppress Evidence was sent by regular United States mail to Lawrence W. Vuillemin, Assistant Prosecuting Attorney for Summit County, Ohio, this 3rd day of June, 1976.

/s/ Ralph B. Maher
Ralph B. Maher, Attorney
for Defendant

*In order to avoid any conflict with Rule 23.3 of the Supreme Court of

the United States, the memorandum originally attached to the motion to suppress is not included in this appendix.

APPENDIX E

THE STATE OF OHIO)		COURT OF THE
Summit County ss:)		COMMON PLEAS
THE STATE OF OHIO)		May Term, 1976
)		
vs.)		No. CR 76 1 118
)		
JOHN GUYTON)		JOURNAL ENTRY

THIS DAY, to wit: The 22nd day of June A.D., 1976, this cause came on for further hearing on the Defendant's Motion, filed herein by and through his counsel, RALPH B. MAHER, for an order to Suppress, said hearing having commenced on June 21, 1976. After hearing testimony of witnesses and statements of counsel and upon due consideration of the Court, IT IS HEREBY ORDERED that said Motion be OVERRULED.

AND THIS SAME DAY, to wit: The 22nd day of June A.D., 1976, the Defendant again appeared before this Court with his counsel and was fully advised of his Constitutional rights and his rights as required under Rule 11 of the Ohio Criminal Rules of Procedure.

Thereupon, the Defendant retracts his plea of Not Guilty heretofore entered and, for plea to said Indictment, says he pleads "NO CONTEST" and the Court, after hearing statements of counsel and based upon the facts as found by this Court, finds the Defendant GUILTY as charged in Count Number One (1) and Count Number Two (2) of the Indictment.

Whereupon, the Court inquired of the said Defendant if he had anything to say why judgment should no' be pronounced

against him; and having nothing to say but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THE COURT that the Defendant, JOHN GUYTON, be imprisoned and confined in the CHILLICOTHE CORRECTIONAL INSTITUTE at Chillicothe, Ohio, for an indeterminate period of not less than ONE (1) YEAR and not more than TEN (10) YEARS for punishment of the crime of CARRYING A CONCEALED WEAPON, Ohio Revised Code Section 2923.12, a felony of the third (3rd) degree, and for an indeterminate period of not less than ONE(1) Year and not more than the maximum of FIVE (5) YEARS for punishment of the crime of HAVING A WEAPON WHILE UNDER DISABILITY, Ohio Revised Code Section 2923.13, a felony of the fourth (4th) degree, and that he pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio, 44308.

THEREUPON, the Court informed the Defendant of his right to appeal pursuant to Rule 32 (A) (2), Criminal Rules of Procedure, Ohio Supreme Court, and further ordered that the sentence imposed herein be held in abeyance and the same bond be continued pending said appeal.

APPROVED:
June 22, 1976

SAM H. BELL, Judge
Court of Common Pleas
Summit County, Ohio

cc: Attorney Ralph B. Maher
Booking Desk
Witness Assistance
Prosecuting Attorney

APPENDIX F

PROPOSITIONS OF LAW FILED IN IN THE SUPREME COURT OF OHIO

PROPOSITION OF LAW NUMBER 1

A warrantless unreasonable search and seizure, which were totally lacking in probable cause, which search and seizure might even have been made in good faith, but where there were no exigent nor emergency circumstances, and when said search and seizure made prior to any arrest are illegal, and any evidence no matter how reliable, acquired as a result of an unreasonable search must be suppressed. A routine search of a motorist's person, and a subsequent arrest for two other non-related traffic offenses, including a weapon, unless the Officer or Officers have probable cause for believing the Defendant is armed and dangerous, result in any evidence seized being excluded and inadmissible.

PROPOSITION OF LAW NUMBER 2

The Exclusionary Rule covering evidence obtained by an illegal search and seizure, should have been followed, as there were none of the judicially recognized exceptions to the Rule, including, but not limited to the following:

(a) A search incident to a lawful arrest;

(b) The stop and frisk doctrine;

(c) Hot pursuant;

(d) Consent by the Defendant-Appellant;

(e) The plain-view doctrine;

(f) Emergency Searches where crucial evidence might be lost or destroyed;

(g) Contraband;

(h) Mail searches;

(i) Moving vehicles;

(j) Goods in the course of transit;

(k) Health and safety inspections;

(l) Instrumentalities of crime;

(m) Fruits of crime;

(n) A crime having been committed, being committed or about to be committed;

(o) Any other criminal activity;

(p) Etc.

PROPOSITION OF LAW NUMBER 3

It is a violation of Fourth Amendment rights if the conduct of Government Agents violates the privacy upon which an individual justifiably relies. The Fourth Amendment guarantees protection against unreasonable searches and seizures. There has been a determination of constitutionally protected areas, including but not limited to, homes, taxicabs, and automobiles. Without probable cause for

arrest and without a Warrant for search and arrest, all evidence seized from the Defendant-Appellant, and from a given "area", to wit: The inside of Defendant-Appellant's automobile, which he sought to preserve as private, even though said "area" may be accessible to the public, should be constitutionally protected. The Fourth Amendment protects people, not places, and such evidence must be excluded and inadmissible.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-620

JOHN GUYTON

Petitioner

-vs-

THE STATE OF OHIO

Respondent

****

RESPONDENT'S ANSWER

TO

PETITION FOR A WRIT OF CERTIORARI

From the Supreme Court of Ohio

****

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TABLE OF AUTHORITIES

OPPOSITION TO JURISDICTION

In the first instance, the Petitioner has failed to successfully raise a constitutional issue. The fact that Petitioner mentions the concepts of due process and equal protection does not create a constitutional question where, in reality, none exists. Furthermore, an inspection of the opinions of the Ohio Courts involved, evidences that no constitutional issue was ever presented or decided. The alleged error before this Court concerns Ohio Procedure and not an issue repugnant to the United States Constitution.

Secondly, the Petitioner is basing his jurisdiction for a Writ of Certiorari on issues concerning Ohio procedure and judicial discretion which are not within the ambit of 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

On March 13, 1976, Petitioner was indicted for Carrying a Concealed Weapon in violation of Section 2923.12, of the Ohio Revised Code, and secondly, for Having a Weapon While Under Disability in violation of Section 2923.13(A)(2) of the Ohio Revised Code. On June 3, 1976, Petitioner filed his motion to suppress evidence. The motion was overruled at a hearing in the Summit County Court of Common Pleas on June 22, 1976. The Petitioner then entered a plea of "no contest" to the two counts of the indictment. Subsequently, Petitioner was sentenced 1-10 years for Carrying a Concealed Weapon and 1-5 years for Having a Weapon While Under Disability, to be run concurrently. Said sentence was held in abeyance and the prior bond was continued pending appeal.

On July 22, 1976, timely notice of appeal was filed, and on February 2, 1977, the Court of Appeals, Ninth District of Ohio, affirmed the judgment. On March 4, 1977, timely notice of appeal was filed to the Supreme Court of Ohio. The Supreme Court dismissed Petitioner's appeal on June 30, 1977,

and overruled Petitioner's motion for leave to appeal. It is from the dismissal of this appeal that Petitioner seeks a writ of certiorari.

STATEMENT OF FACTS

The State of Ohio, does not contest the Statement of the Case offered by the Petitioner. The State does, however, disagree with portions of the conclusions offered by the Petitioner in his Statement of Facts. Therefore, the State offers the following supplement to the facts presented in the Petitioner's Brief.

On December 14, 1975, Officer Sparks and Officer Burell were working together on police patrol duty for the City of Akron. During the evening hours of their shift, these officers were dispatched to a west side neighborhood to investigate a "drunk" passed out at the wheel of a car (Transcript, Page 2). Upon investigation, the officers discovered the Appellant passed out at the wheel of his auto. The officers also detected an alcoholic odor coming from the auto (Transcript, Page 35). The vehicle was in the street, on the wrong side of the road, with the headlights on and the engine running (Transcript, Page 3).

In the process of attempting to arouse the Appellant, Officer Sparks observed an empty holster

on the Appellant's belt while the Appellant was still inside his car (Transcript, Page 3, 8, compare however, Pages 9-10). Officer Burell saw something hanging on the Appellant's belt but was unable to identify it as an empty holster (Transcript, Page 79). Officer Burell did testify, however, that the Appellant was fidgeting around between and under the seat (Transcript, Page 78). At this point both officers pulled their guns and removed the Appellant from his auto. An immediate frisk was conducted and the Appellant was in fact wearing an empty holster and also was carrying a loaded .38 caliber revolver in his rear pocket.

The Appellant was subsequently placed under arrest for carrying a concealed weapon and intoxication.

After the motion to suppress, upon a plea of no contest, the trial judge found the Appellant guilty. Since the instant offense was the Appellant's fourth weapons conviction, the Court imposed a penitentiary sentence with a provision for an appeal bond (Transcript, Pages 144-145).

RESPONDENT'S ANSWER TO THE PETITIONER'S REASON FOR GRANTING THE WRIT

THE DECISION BELOW REGARDING THE CONDUCT OF THE RESPONDENT IS CONTRARY TO THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND RELEVANT DECISIONS OF THIS COURT.

The Fourth Amendment of the United States Constitution does not prohibit all searches. The scope of its protection is based on reasonableness. Only "unreasonable" searches are prohibited. While there can be no argument that warrantless searches are less preferred than searches under a warrant, the former are not entirely prohibited.

There are various warrantless searches which are held "reasonable" due to the attending circumstances. This Court has set forth a two-prong-test for reasonability in Terry v. Ohio, 392 U.S. 1, 28-29 (1968).

> First, the court must determine the presence of circumstances sufficiently exigent to warrant disregard of the Fourth Amendments ban against invasions of privacy. Second and equally important the court must examine with care the manner and scope of the search that was conducted in response to the purportedly "exigent circumstances." United States v Langley, 466 F.2d 27, 34 (6th Cir. 1972)

The State submits that the exception to the warrant requirement which validated the initial intrusion in this case was the "emergency doctrine". In any situation where an individual is in some type of distressed state, a police officer has not only a right but a duty to assist or investigate. Pursuant to this duty, the law officer may make any reasonable intrusion necessary to obtain the information required to offer assistance. Evidence of criminal activity, discovered in the process of helping a distressed individual, is admissible in criminal prosecutions under the "emergency situation doctrine." Wayne v United States, 318 F.2d 205, 212 (D.C. Cir. 1963); United States v Barone, 330 F.2d 543, 545 (2d Cir. 1964), cert. denied, 377 U.S. 1004 (1964).

The State maintains that under the circumstances the search met the standards of reasonability set forth in Terry, supra. In support of their initial radio information, the officers determined that the Petitioner appeared to be passed out behind the wheel of his automobile. The vehicle was in the street on the wrong side of the road in danger of being struck by on-coming cars. Officers

checked on Petitioner's condition by performing a reasonable and limited intrusion into his car. The State submits that the circumstances were sufficiently exigent to warrant their limited initial intrusion.

While the officers continued to check on the Petitioner's condition by performing a reasonable and limited intrusion, evidence developed that the Petitioner may be armed. The officers by pulling their guns and conducting an immediate "frisk" for weapons, acted in the only logical manner consistent with their safety. Probable cause to arrest or search clearly does not control the fact pattern in issue. While the officers may have had probable cause to arrest (intoxication), their conduct forming the foundation for a "frisk" is only required to be based on probable cause to investigate. As outlined in Terry, supra, this standard is less than probable cause to arrest and is conducted for the officers safety. See also, Adams v Williams, 407 U.S. 143 (1972).

Although, the officers may not have feared Petitioner, the facts indicated that he may be armed and dangerous.

Pursuant to the argument offered, the State respectfully submits that the police conduct in the instant case comports within the constitutional mandates.

CONCLUSION

The Respondent respectfully requests this Court, pursuant to the Argument offered, to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

STEPHAN M. GABALAC
Prosecuting Attorney

Carl M. Layman III

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CERTIFICATION OF SERVICE

I, CARL M. LAYMAN III, being a member of the bar of the United States Supreme Court, do certify, pursuant to Supreme Court Rule 33(3)(b), that three copies of Respondent's Answer to Petitioner's Writ for Certiorari was mailed, first class postage prepaid, to RALPH B. MAHER, Attorney at Law, 630 Centran Building, Akron, Ohio 44308.

Carl M. Layman, III

CARL M. LAYMAN III
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Attorney
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216/379-5510

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-620

JOHN GUYTON
Petitioner,

VS.

STATE OF OHIO
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR SUMMIT COUNTY, OHIO

REPLY BRIEF FOR PETITIONER

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I N D E X

TABLE OF AUTHORITIES

Cases:

Statute:

JURISDICTION

Respondent contends (Answer p.1) that "the Petitioner has failed to successfully raise a constitutional issue." I submit this contention is baseless and inaccurate. The constitutional question of whether the evidence presented was obtained as a result of an illegal search and seizure was initially raised in Petitioner's motion to suppress.[1] After the motion was overruled by the trial court, the issue was properly presented at every stage of appeal. See Pet. p. 8. In fact, the entire basis of Petitioner's appeal has been the question of the validity of search and seizure conducted by the officers involved herein. See Opinion of the Court of Appeals for Summit County, Ohio, Pet. App. A. p. 17.

Respondent also contends (Answer p. 1) that the issues raised by Petitioner "are not within the ambit of 28 U.S.C. §1257(3)." I submit this is inaccurate. 28 U.S.C. §1257(3) provides in relevant part that "(f)inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed

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1. The motion to suppress was included as Appendix D at pages 24 to 26 of the Petition for a Writ of Certiorari, (hereinafter cited as Pet.), filed with this Court on October 28, 1977. Ground number four (4), included therein at page 25, specifically refers to violations of the Constitution of the State of Ohio and the Fourth and Fourteenth Amendments to the Constitution of the United States.

by the Supreme Court. . . .(b)y writ of of certiorari,. . . .where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . . of. . . .the United States." In this case the issues presented are specially set up and claimed under the Constitution of the United States.

STATEMENT OF FACTS

Petitioner has reviewed the Statement of Facts included in Respondent's Answer and makes the following observations and corrections:

1. Respondent contends (Answer pp.4,7) that Petitioner's "vehicle was in the street, . . .(with) the engine running,. . . . (and was) in danger of being struck by on-coming cars." Petitioner has fully described the physical position and condition of his automobile at the time of this incident. See Pet. p. 4 and accompanying footnote 2 at pp. 4-5. A review of the transcript will further show that it was highly questionable that the automobile was running or was in any more danger of being struck by on-coming cars than any other vehicle parked on this quiet, lightly travelled, residential street.

2. Respondent alleges (Answer pp 4-5) that "Officer Sparks observed an empty holster on the Appellant's belt while the Appellant was still inside his car." I submit that this statement is an absolute untruth. See Tr. p. 9, where Officer Sparks stated upon cross-examination that "I didn't (see the holster)." Respondent even admits (Answer p. 5) that "Officer Burell saw something hanging on Appellant's

belt but was unable to identify it as an empty holster." The plain fact, as was confirmed by the Trial Court (Tr. p. 135), is that while Petitioner was inside his parked vehicle slumped over the wheel, neither officer was in a position to see his holster.

The whole thrust of Petitioner's above observations is to call to this Court's attention that from the very inception of this case, Respondent has attempted to either mis-state or misquote the facts, even to the extent of giving testimony at the hearing on the motion to suppress that was completely opposite to testimony given at the preliminary hearing in the Akron Municipal Court. The inaccuracies were not corrected until the officer re-stated his original preliminary hearing testimony upon cross-examination.

REASON FOR GRANTING THE WRIT

1. Respondent relies exclusively on the "emergency doctrine" exception to the warrant requirement in order to validate the search of Petitioner in his parked automobile. (Answer p.7). An analysis of the cases Respondent cites in support of this contention shows that this exception is not applicable to the case at bar.

In Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963), then Judge Burger considered a case in which a "disbarred" doctor had committed a criminal abortion which resulted in the death of a young schoolteacher. The deceased's sister had gone with her to the doctor's apartment.

She was present when the defendant doctor returned from the bedroom where the abortion had been performed and screamed: "Oh my God, I believe she's dead." The sister was able to flee the apartment over the resistance of the doctor's assistant, and then notified the police. When the police arrived at the apartment they announced themselves and after knocking on the door for ten minutes without receiving an answer, they were forced to break down the door. At this time the police thought "a dying or unconscious person" was being held within. On the basis of the emergency at hand, the autopsy report later conducted by the coroner was held admissible in evidence.

Judge Burger's opinion described "exigent circumstances" as consisting of "smoke coming out of a window or under a door, the sound of gunfire in a house, threats from inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within." Ibid. at 212. The situation existing in the case at bar does not even approach these calamities. According to the Respondent's own Statement of Facts (Answer p. 4) "the officers were dispatched to investigate a 'drunk'." When they arrived they came upon a "rather peaceful scene." Tr. p. 96. It was certainly not one of the emergency situations referred to in Wayne; since the officers did not believe a crime had been committed and did not administer any emergency aid.

In United States v. Barone, 330 F.2d 543 (2nd Cir 1964), cert. denied, 377 U.S. 1004 (1964), New York City policemen rightfully demanded entrance to an apartment after hearing loud screams eminating therefrom in the dead of night. After being admitted to the apartment, counterfeit currency was found in plain view. The evidence was held admissible as a product of an emergency search because the officers "had every reason to fear that assault or mayhem was being committed." Ibid. at 544. In contrast, here the officers testified to no such fears.

2. In the event this Court finds that the "emergency doctrine" is applicable to the search of Petitioner in his automobile, it would be necessary to reach Respondent's second contention (Answer p. 8) that (the officers) conduct forming the foundation for a 'frisk' is only required to be based on probable cause to investigate." Respondent's reliance on Terry v. Ohio, 392 U.S. 1 (1968), and Adams v. Williams, 407 U.S. 143 (1972), is unjustified since the officers did not believe Petitioner was armed and dangerous. See Pet. pp.12-13. In effect, Respondent is asking this Court to ignore its prior precedents by upholding the admission of evidence in circumstances which do not comply with any of the narrowly drawn exceptions to warrant clause.

CONCLUSION

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

RALPH B. MAHER
630 Centran Building
Akron, Ohio 44308
(216) 762-8691

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 1977, three copies of this Reply Brief were mailed to Carl M. Layman III, Assistant Summit County Prosecuting Attorney, 53 East Center Street, Akron, Ohio 44308. I further certify that all parties required to be served have been served.

RALPH B. MAHER